No. 21-20577

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Jillian Ostrewich,

Plaintiff–Appellant/Cross-Appellee

v.

Isabel Longoria, in her official capacity as Harris County Elections Administrator; John Scott, in his official capacity as Secretary of State of Texas; Ken Paxton, in his official capacity as the Attorney General of Texas,

Defendants–Appellees/Cross-Appellants

Kim Ogg, in her official capacity as Harris County District Attorney,

Defendant–Appellees

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No: 4-19-CV-00715, Hon. George Hanks, Judge

Plaintiff-Appellant-Cross-Appellee Jillian Ostrewich's Principal Brief

---

WENCONG FA
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111

Counsel for Plaintiff-Appellant-Cross-Appellee

CERTIFICATE OF INTERESTED PERSONS

1. No. 21-20577, *Ostrewich v. Longoria*,
USDC No. 4:19-CV-00715 (S.D. Tex.)

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiff-Appellant/Cross-Appellee:

Jillian Ostrewich

Counsel for Plaintiff-Appellant:

Wencong Fa (Lead/Counsel of Record)
Deborah J. La Fetra
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
wfa@pacificlegal.org

Defendants-Appellees/Cross-Appellants:

Isabel Longoria, in her official capacity as Harris County Elections Administrator
John Scott, in his official capacity as Secretary of State of Texas
Ken Paxton, in his official capacity as Attorney General of Texas

Defendant-Appellee:

Kim Ogg, in her official capacity as Harris County District Attorney

Counsel for Defendants-Appellees and/or Cross Appellants:

Stan Clark, counsel for Defendant-Appellee/Cross-Appellant
Isabel Longoria
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 755-5117
Facsimile: (713) 755-8924
stan.clark@cao.hctx.net

Michael R. Abrams, counsel for Defendants-Appellees/Cross-Appellants John Scott and Ken Paxton
Assistant Solicitor General
Office of the Attorney General of Texas
P.O. Box 12548 (MC-059)
Austin, Texas 78711
Telephone: (512) 936-6407
Michael.Abrams@oag.texas.gov

Christopher D. Hilton, counsel for Defendants-Appellees/Cross-Appellants John Scott and Ken Paxton
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548 (MC-019)
Austin, TX 78711-2548
Telephone: 512-475-4120
christopher.hilton@oag.texas.gov

Meagan Scott, counsel for Defendant-Appellee Kim Ogg
Assistant District Attorney
Harris County District Attorney's Office
500 Jefferson, Suite 600
Houston, Texas 77002
Telephone: (713) 274-5816
Scott_meagan@dao.hctx.net

To my knowledge, there are no other interested parties within the meaning of 5th Cir. Rule 28.2.1.

/s/ Wencong Fa
WENCONG FA
Counsel of Record for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Jillian Ostrewich respectfully requests oral argument. This Court's resolution of the important questions raised in this appeal will affect the free speech rights of voters in every election. Oral argument will give these important issues the attention they warrant, allow the advocates to assist the Court in understanding the record established at the district court, and aid the Court in its careful and comprehensive consideration of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Jillian Ostrewich is a self-described "fire wife" who went to a Houston polling place in October 2018 in a yellow "Houston Firefighters" t-shirt bearing the logo of her husband's union. ROA.611. An election worker stopped her, pulled her out of line, and demanded that she turn her shirt inside-out before she would be allowed to vote because they were "voting on that." ROA.596–97. The election worker was presumably referring to Houston's Proposition B, a ballot measure involving firefighter pay. Yet, as the district court noted, Ostrewich's shirt made no mention of Proposition B. ROA.32–33; ROA.2877 (observing that Ostrewich "had no intention of violating Texas' political-apparel ban in 2018 when she wore her yellow T-shirt—which expressed only general support for 'Houston Fire Fighters' and did not mention Proposition B."). Feeling "baffled" and "violated" by the election worker's demands, ROA.597–98, Ostrewich filed a civil rights lawsuit, alleging that the statutes giving rise to the incident violate the Free Speech Clause of the First Amendment.

Texas Election Code Sections 61.003, 61.010, and 85.036[1] are interrelated electioneering statutes that Texas interprets to prohibit voters from wearing certain apparel at the polling place and within a 100-foot buffer zone. Sections 61.003 (applicable on Election Day) and 85.036 (applicable during early voting) prohibit voter apparel in the polling place and buffer zone if the election worker enforcing the statute deems it "electioneering for or against any candidate, measure, or political party," on the ballot or not. Section 61.010 provides that "a person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election" within the polling place or buffer zone.

Applying the test that the Supreme Court announced in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the court below held that Sections 61.003 and 85.036 were facially unconstitutional under the First Amendment. ROA.2952 (adopting Magistrate's Memorandum and Recommendation in full); ROA.2863–99. But it upheld Section 61.010, both on its face and as applied to Ostrewich, because the t-shirt could be

[1] All code sections refer to the Texas Elections Code unless otherwise noted.

"associated" with support for Proposition B. *Id.* In so doing, the district court incorrectly applied the reasonableness test mandated by the Supreme Court in *MVA*. The district court disregarded uncontradicted evidence that election judges and election officials were hopelessly confused about how to apply the electioneering statutes, that the State consistently declined to provide useful guidance, and that election workers believed the statutes authorized them to ban a vast array of voter apparel as "related to" a candidate, measure, or political party on the ballot.

The extensive record established below thus dooms Section 61.010. In *MVA*, the Supreme Court invalidated the Minnesota electioneering statute because it was *susceptible* to inconsistent interpretation among the myriad poll workers who enforced it. *MVA*, 138 S. Ct. at 1890. Here, the record shows that the Texas electioneering statutes *are* applied differently by election workers and election officials at the state and county level. Just as there are no "objective, workable standards" to guide election workers in enforcing Sections 61.003 and 85.036, there are no such standards to guide them in enforcing Section 61.010. *Id.* at 1891. The First Amendment demands more. If Texas wishes to threaten voters

with criminal penalties for wearing t-shirts and hats, it must, at a minimum, provide some "sensible basis for distinguishing" between legal and illegal apparel. *Id*. at 1888.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Jillian Ostrewich brought this lawsuit in the district court pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. ROA.18. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. This appeal arises from the district court's order granting, in part, Defendants-Appellees' motion for summary judgment. ROA.2950–51. The district court entered its judgment on September 30, 2021. ROA.2952. Appellant filed a timely Notice of Appeal on October 27, 2021. ROA.3114. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Tex. Elec. Code § 61.010 facially violates the Free Speech Clause of the First Amendment as incorporated via the Fourteenth Amendment, under *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), or the overbreadth doctrine.

2. Whether Tex. Elec. Code § 61.010 violates the Free Speech Clause of the First Amendment as applied to Ostrewich's speech.

3. Whether Ostrewich is entitled to nominal damages.

STATEMENT OF THE CASE

Factual Background. Jillian Ostrewich is a self-described "fire wife" married to a firefighter who serves in the Houston Fire Department and is a member of the AFL-CIO affiliated International Association of Fire Fighters. ROA.611.[2] Sometime in 2017, Ostrewich's husband gave her a yellow IAFF/AFL-CIO union "Houston Fire Fighters" t-shirt:[3]

[2] In October 2021, the Ostrewich family permanently relocated to New Braunfels, Texas. Nonetheless, the case is not moot as against the State Defendants, and as to Harris County Defendants for declaratory relief, because Ostrewich—and all Texans—remain subject to Section 61.010 and because Ostrewich seeks nominal damages for the completed constitutional injury done to her on October 24, 2018. *See Uzuegbunum v. Preczcinski*, 141 S. Ct. 792, 802 (2021) (since-graduated student's First Amendment claim not mooted where he seeks nominal damages for a completed past injury). Her husband continues to work as a Houston firefighter.

[3] The design of Ostrewich's shirt predates her 2017 acquisition. *See Cover*, 47 Houston Fire Fighter No. 1 (Jan.–Mar. 2016), https://d3n8a8pro7vhmx.cloudfront.net/local341/pages/68/meta_images/original/HFF-QTR-1-2016-online-1.jpg?1461693362.

ROA.32–33. She routinely wore her t-shirt while "walking the dog, riding [her] bike, and using the weed whacker." ROA.590–91 ("It's just a T-shirt in my closet that I wear . . . there's no rhyme or reason to it. I just wear it."); ROA.601; ROA.608.

A year later, Houston voters were presented with Proposition B on the November 2018 ballot, an initiative measure concerning firefighter pay. On October 24, 2018, during the early voting period, Ostrewich went to vote at the Metropolitan Multi-Service Center in Houston while wearing her union t-shirt, which said nothing about Proposition B or firefighter pay. Nonetheless, an election clerk confronted Ostrewich as she tried to enter the polling place and told her she could not wear her shirt inside because they were "voting on that."[4] ROA.596–97. Consistent with the policy at this polling location established by Presiding Election Judge Kathryn Gray, the election clerk instructed Ostrewich to go to the restroom and turn her shirt inside-out before she would be allowed to vote. ROA.592; ROA.635 (Gray: "Nobody was allowed to vote without first having turned her Houston firefighter's shirt inside out."). Ostrewich was

[4] The parties were unable to identify the specific election worker who ordered Ostrewich to change her t-shirt. ROA.595.

"baffled" and felt "violated" by the election clerk's demands. ROA.597–98. Not wanting to be disrespectful, Ostrewich complied, returned to the back of the line, voted, and left immediately. ROA.600; ROA.593; ROA.602. She spoke to no one inside or outside the polling place other than her husband and the election workers. ROA.1147.

The next day, in light of growing controversy over enforcement of electioneering statutes against voters wearing union shirts, then-Harris County Administrator of Elections Sonya Aston instructed election workers that they must allow voters to wear the shirts that lacked reference to Proposition B; the same shirt that an election worker prevented Ostrewich from wearing the day before. ROA.710; ROA.728. Specifically, Aston "instruct[ed] the polls to allow people wearing non-proposition supporting/opposing t-shirts to come in without covering up their t-shirts. Only those wearing the proposition t-shirts need to cover up." *Id.*[5] For the remainder of the early voting period and on Election Day, there is no evidence of any disturbances involving voters wearing union shirts.

[5]Aston sent her guidance to every polling place in Harris County, including the Multi-Service Center (designated SRD134M) where Ostrewich voted. ROA.708; ROA.722; ROA.1900; ROA.1954–55 (message received).

Electioneering Statutes. Ostrewich challenged three Texas statutes that govern what people can wear in polling places and within 100-foot buffers marked around polling places: Texas Election Code Sections 61.003, 61.010, and 85.036. Sections 61.003 (on Election Days) and 85.036 (during early voting periods) codify "the general prohibition against electioneering" (ROA.775) that makes it unlawful for a person to "electioneer[] for or against any candidate, measure or political party" within 100 feet of "an outside door through which a voter may enter the building in which a polling place is located" during the voting period. Tex. Elec. Code §§ 61.003(a)(2); 85.036(a). The statutes define electioneering as "the posting, use, or distribution of political signs or literature." Tex. Elec. Code §§ 61.003(b)(1), 85.036(f)(2). Under variously numbered code sections, Texas law has prohibited "loitering and electioneering" in and around polling places for more than 115 years. *See, e.g.*, *Whaley v. Thomason*, 93 S.W. 212, 214 (Tex. Civ. App. 1906). The government[6] interprets the statutes broadly to encompass passive forms of electioneering, including voters wearing or displaying hats, t-shirts,

[6] The State Defendants' positions are asserted by the Secretary of State's Elections Divisions director, 30(b)(6) witness Keith Ingram. The County Defendants align with the State's positions. ROA.885–86.

buttons, bumper stickers, and so on. ROA.787. A separate statute, Tex. Elec. Code § 61.008, covers "verbal electioneering, . . .a much more serious crime." ROA.786.

Aside from the general electioneering statutes above, Tex. Elec. Code § 61.010(a) provides that "a person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election," in the polling place or within the 100-foot buffer. Section 61.010 was enacted well after the general electioneering statutes. Acts 1987, 70th Leg., ch. 472, § 17, eff. Sept. 1, 1987. Section 61.010 was not meant to duplicate the prohibitions established in Section 61.003, but instead to prevent poll watchers from skirting the general electioneering statutes by wearing a name badge identifying the watcher as a watcher for a particular candidate. *See* Sections 61.001(a-1); 33.061(f); 62.003(c) (*e.g.*, poll watchers required to wear name tags); ROA.916 (explaining legislative history of Section 61.010 to address poll watcher name badges); ROA.1468 (Handbook for Election Judges and Clerks explaining name tag and badge requirements). A violation of any of the

electioneering statutes, including Section 61.010, is a class C misdemeanor, a criminal offense. Section 61.010(c); ROA.788.

Prior to the district court's opinion on September 30, 2021, the State interpreted Section 61.010 to apply primarily to identification badges and name tags worn by poll watchers, because voter apparel was already covered by the general electioneering prohibition in Sections 61.003 and 85.036. Following the district court ruling, the State adopted the view that Section 61.010 now serves as the general electioneering statute. Texas Sec'y of State, Election Advisory No. 2021-13 (Oct. 18, 2021)[7] ("Based on the district court's ruling, a person may not wear apparel or a similar communicative device relating to a candidate, measure, or political party appearing on the ballot in the current election under Section 61.010, but a person may wear such apparel relating to a candidate, measure, or political party that does not appear on the ballot in the current election.") (emphasis original).

[7] https://www.sos.state.tx.us/elections/laws/advisory2021-13.shtml. Defendant-appellee Isabel Longoria continues to advise voters using the broader language of Sections 61.003 and 85.036. Harris County Election Division Knowledgebase, Frequently Asked Questions, Voting Process: *Is Electioneering Allowed Within the Polling Location?*, https://www.harrisvotes.com/FAQ#VotingProcessFAQ (visited Feb. 1, 2022).

Official Interpretation. The Secretary of State Elections Division provides general guidance as to the meaning of the electioneering statutes to county election administrators, election workers, and voters. ROA.769. This guidance aims to "obtain and maintain uniformity in the application, operation, and interpretation of the Texas Election Code and [other] election laws." ROA.876; ROA.769. But when confronted with questions from Texans regarding the proper application of the electioneering statutes to apparel, the Division's usual practice is to decline to give an answer as to what may come in to the polling place and what must stay out. *See, e.g.*, ROA.944–45 (refusal to state whether firefighters can vote in uniform with Houston's Proposition B on the ballot); ROA.923–31 (refusal to state whether a Black Lives Matter sign at a polling location is electioneering); ROA.933–34 (refusal to state whether "Vote the Bible," "vote atheist," or "vote to save Big Bird" t-shirts could be banned); ROA.936–37 (refusal to state whether election workers could wear "patriotic" red, white, and blue). On rare occasions, the Elections Division provides a direct answer, such as advising the Harris County Democratic Party that "[a] MAGA [Make America Great Again] hat is associated with a particular candidate and is electioneering under

61.003," ROA.939–42; ROA.772, 774–75; and telling one poll worker that a Black Lives Matter shirt and "perhaps a[n] NRA shirt" are permitted inside polling places. ROA.986. These individual communications are neither publicly available nor shared with other local election officials, and the Elections Division disclaims that its messages "necessarily constitute[] an official or binding statement of [the State's] position or interpretation of any matter." ROA.864–66.

In lieu of providing specific advice, the Election Division directs local election officials to exercise their own discretion at individual polling locations because they are "in the best position to determine whether a person is engaged in electioneering." ROA.781; ROA.884 (Harris County[8] explained that "a duly appointed and commissioned presiding election judge is the entity that interprets and enforces Tex. Elec. Code §§ 61.003, 61.010, and 85.036 at their respective polling location."); ROA.879; ROA.783 (Ingram: "[T]he presiding judge in a local election is the one who will know what measures are on the ballot and what apparel might be associated with that measure").

[8] Because of changing officeholders named as defendants in this action, Ostrewich refers to these officers by title or entity.

Conversely, local officials rely on the training provided by the Secretary of State via county election administrators to learn how to enforce the electioneering statutes. ROA.770. One election judge, for instance, acknowledged that she "[has] to be informed," and testified that she "is only informed . . . through training." ROA.630 (Morris).[9] *See also* ROA.693 (Barker relies on sample ballot included in training); ROA.885 (Harris County "defers to the Texas Legislature and the Texas Secretary of State as the Chief Elections Officer" to determine how to enforce the electioneering statutes against hats and t-shirts.).

The Elections Division relies on tens of thousands of these local officials across the state to interpret and enforce the statutes, particularly regarding local measures and candidates. ROA.783–84; ROA.785 (Ingram: "election judges or deputy early voting clerks are political people that are tuned in, and we expect them to rely on their experience, as well as their training"). Yet local election workers may be ignorant of local issues and candidates. One election judge (Morris) testified that although she's "plugged in to federal issues," she "really

[9] Ostrewich deposed three election workers with many years' experience serving as both election clerks and election judges: Kathryn Gray and Ruthie Morris in Harris County, and Terry Barker in Dallas County.

[doesn't] care about the Houston city issues." ROA.680. *See also* ROA.649 (Morris: "Sometimes I don't even know what's on the ballot because I'm so busy. It's like a plumber who can't fix their own plumbing, and it's like I don't even know what's on the ballot, so I don't know what T-shirts to kick out."); ROA.659 (Morris: "I've seen political statements that I really didn't even understand. There's so much going on with different groups, different people, different things, different, you know, logos, like I don't know what every logo is. So I might accidentally let someone in with a logo that I shouldn't, but it's just because I don't even know what the logo is."). Election judge, Kathryn Gray, testified that she is "not a big TV person," and not "a big news person," so it "mostly likely [] doesn't happen" that she would be "informed basically on [her] own." ROA.631.

State and local election officials agree that the electioneering statutes target apparel well beyond express advocacy for or against candidates, measures, or political parties.[10] The statutes declared unconstitutional below—Sections 61.003 and 85.036—extend to apparel related to candidates, measures, or political parties in the past, present,

[10] Because the State believes that *MVA* required no changes to its enforcement of Texas law, some interpretative materials predate the June 2018 decision. ROA.730.

or future. ROA.1896–98. Section 61.010 extends to apparel related to candidates, measure, or political parties on the present ballot. State and local officials charged with implementing and enforcing the statutes testified the following apparel would be "related to" a candidate, measure or political party which could be on a present ballot:

- the name, logo, or slogan of an organization that endorses or supports a candidate or issue. ROA.726 ("If someone is wearing a t-shirt, button, bumper sticker, etc. from an organization that endorses a candidate, political party or a measure, it needs to be covered up when within the 100' area."); ROA.710 (ban "ACLU" and "NRA" if "actively supporting candidates or propositions"); ROA.643 (ban "NRA" and union logos if either organization endorsed candidate).
- slogans associated with a candidate or party. ROA.654; ROA.672–73 ("Build the Wall"); ROA.718 (same); ROA.698 (same); ROA.678 ("Medicare for All"); ROA.699 (same).
- parody language that inferentially refers to a candidate. ROA.658–59 ("Make Bitcoin Great Again" hat in the same colors and font as MAGA).

- the name of political parties that are not recognized in Texas.

ROA.965–66. (Tea Party apparel, and Socialism USA shirt).[11]

Secretary of State Elections Division Chief Keith Ingram, former Harris County Administrator of Elections Sonya Aston, and election judges Kathryn Gray, Ruthie Morris, and Terry Barker offer inconsistent interpretations of how the electioneering statutes apply to various t-shirt designs (continued on the next page):

[11] The Secretary of State recognizes only four political parties in Texas: Republican, Democratic, Libertarian, and Green. https://www.sos.state.tx.us/elections/candidates/index.shtml (visited Feb. 1, 2022). Ostrewich respectfully requests judicial notice of information found on this and other government websites cited in this brief. *In re Katrina Canal Breaches Consol. Lit.*, 533 F. Supp. 2d. 615, 632 (E.D. La. 2008) ("The Fifth Circuit has determined that courts may take judicial notice of governmental websites.").

Apparel	**Ingram**	**Aston**	**Gray**	**Morris**	**Barker**
NRA[12]	Allowed	Banned	Maybe[13]	Maybe	Banned
2nd Amend.[14]	Not Asked	Allowed	Maybe	Maybe	Allowed
BLM[15]	Allowed	Maybe	Allowed	Banned	Banned
Texas Org. Proj.[16]	Allowed	Banned	No knowledge[17]	Not Asked	Not Asked
Ostrewich's shirt[18]	Banned	Allowed	Banned	Unsure	Not Asked
Firefighter uniform[19]	Not Asked	Allowed	Banned	Allowed	Not Asked

[12] Testimony regarding National Rifle Association: ROA.776 (Ingram); ROA.673–74, 676 (Morris); ROA.637, 643 (Gray); ROA.710, 718 (Aston); ROA.700 (Barker).

[13] "Maybe" answers mean that the official would allow the apparel unless there was a related issue on the ballot or the organization endorsed a candidate. *See, e.g.*, ROA.673–74, 676 (Morris: NRA allowed unless gun issue on ballot); ROA.637, 643 (Gray: NRA allowed unless ballot proposition "in regards to that" or unless NRA endorsed a political candidate).

[14] Testimony regarding the text of the Second Amendment: ROA.675–76 (Morris); ROA.637–38 (Gray); ROA.718 (Aston); ROA.700 (Barker).

[15] Testimony regarding Black Lives Matter: ROA.792 (Ingram); ROA.655, 671–72 (Morris); ROA.626 (Gray); ROA.717 (Aston); ROA.699 (Barker).

[16] Testimony regarding the Texas Organizing Project: ROA.795–96 (Ingram); ROA.714–15 (Aston). Election Judge Kathryn Gray had no knowledge of the Texas Organizing Project, Workers Defense in Action, or the Communication Workers of America, although these groups were specifically singled out in Harris County communications regarding electioneering. ROA.627–28; ROA.804–11.

[17] Despite 17 years' experience as an election clerk and judge, ROA.621, Gray "had no experience" with many of the issues related to electioneering or didn't know whether particular names or slogans should be banned. *See, e.g.*, ROA.632 ("Never Socialism"); ROA.634 (Andrew Cuomo); ROA.634 ("Medicare for All"); ROA.636 ("Me too" and Gadsden flag). Similarly, Morris, with seven years' experience as a clerk and judge (ROA.651), considers many names and slogans to be within a "gray area," unclear whether they should be banned or not. ROA.654 ("Build the Wall"); ROA.655 ("Black Lives Matter"); ROA.666–67 ("Save the Whales"); ROA.670 ("Reagan-Bush '84").

[18] Testimony regarding the yellow union shirt: ROA.790–91 (Ingram); ROA.683–84, 686 (Morris); ROA.629, 635, 640 (Gray); ROA.709, 712–13 (Aston).

[19] Testimony regarding firefighter uniforms: ROA.680 (Morris); ROA.642 (Gray);

Enforcement. Any election judge or election clerk may confront voters about their apparel and declare it to be illegal electioneering. ROA.858–62. Some election clerks are designated "greeters" who patrol the voter line, ensure order, assist voters, and enforce the electioneering statutes. ROA.720. Election judges rely on greeters to enforce the electioneering statutes so that the judges themselves can focus on matters directly related to a voter's ability to cast a ballot. ROA.663 (Morris: "usually the greeters catch them first"); ROA.665 (Morris: "The greeter is able to get them to cooperate so the people in the building never have to deal with it or we don't even know it happened."); ROA.622 (Gray: "the purpose of the greeter is to catch all the electioneering before they get into the voting place."); ROA.623 (Gray: "I told [the greeters] that nothing political, T-shirts, pens, hats . . . cannot be in the voting place."); ROA.603 (Ostrewich presumed election workers posted at the door were "in charge" because "they were the ones in charge of who got to go in and who did not.").

ROA.710–11 (Aston).

The sheer quantity of election workers tasked with monitoring voter apparel and confronting voters[20] and the vague dictates of the statutory text unsurprisingly result in inconsistent enforcement. ROA.679 (Morris: "You're going to get a different answer from different judges."). Some election judges are lenient in their enforcement of the electioneering statutes. ROA.662 (Morris: "I'm the kind of person when it comes to the gray area, I tend to not care. I just—I don't think it's that important."). Others are strict. ROA.630 (Gray: "I believe that no political anything—shirts, hats, pins—should be beyond the 100-foot marker"); ROA.698–700 (Barker would prohibit shirts featuring "Tea Party," "Build the Wall," "Medicare for all," "Black Lives Matter," and "NRA.").

As for Ostrewich's yellow union t-shirt, then-Harris County Administrator of Elections Sonya Aston acknowledged that "bright minds may disagree" whether the shirt constitutes electioneering. ROA.728. On October 25, 2018—the day after Ostrewich voted—Harris County

[20] Harris County alone has 46 early voting locations and "anywhere from 750–800 polling locations on Election Day." ROA.706. The County hires approximately 380 people to staff the polls during early voting and up to 6,000 on Election Day in a Presidential election year. ROA.707.

changed course on the yellow t-shirts. Aston's internal email to Harris County officials and staff drew the line at express advocacy:

> There are people wearing yellow fire fighter t-shirts promoting City of Houston Proposition B. There are others who are wearing yellow international organization of Fire Fighters t-shirts, HFD t-shirts, HPD t-shirts, etc. . . . [I]n agreement with [the Elections Division],[21] I sent out a handi message instructing the polls to allow people wearing non-proposition supporting/opposing t-shirts to come in without covering up their t-shirts. Only those wearing the proposition t-shirts needs to cover up.

ROA.728. The "handi message" said:

> If a campaign person is wearing a t-shirt that is supporting or opposing a proposition, then they need to turn it inside out or cover it up when in the building or within the 100' mark. If a person is wearing a t-shirt that has the fire fighter or police emblem on it that does not mention the Proposition, it is ok. Fire fighter or police uniforms are ok.

ROA.1954. The instruction "went out over [the Harris County] system to the different polls[,]" and election judges "would have received it." ROA.708; ROA.722 (message sent to every polling place during early voting). Aston testified that "if it was basically a work shirt or just had the union on it, it was not considered electioneering" whereas the shirts "with 'Prop B' would be prohibited." ROA.1774. While acknowledging

[21] ROA.723.

that election judges have discretion, Aston testified that Ostrewich "should not have been stopped." ROA.709.

Disruption and Deprivation of the Right to Vote. The Secretary of State's training advises local election officials that the law requires them to let voters vote even if they refuse to comply with the electioneering statutes. ROA.778 (Ingram: "if they refuse to comply . . . they are supposed to be moved to the front of the line, voted [sic], and get out of the polling place."). Yet some election workers deprive voters of their ability to cast a ballot if they refuse to remove their hats or cover their shirts. ROA.624 (Gray: if a voter refuses to cover a shirt, "[t]he voter cannot come in and vote."); ROA.695 (Barker recalls two times that a voter left rather than comply with the election worker's demands regarding apparel); ROA.947–49 (election worker deprived voter of his right to vote because he wore a shirt with a capital H similar, but not identical, to Hillary Clinton's logo); ROA.916–21 (voter ordered to remove his MAGA cap left without voting). Election officials do not document these confrontations. ROA.697. Thus, there is no way to ascertain how many voters are deprived of their right to vote during each election because election workers deemed a shirt or hat to be electioneering.

Even when voters are permitted to cast their ballots, election workers' confrontations with voters over apparel cause disruption. ROA.782 (Ingram: "when somebody refuses to comply with the election judge's requirement that they remove the electioneering material, then, yeah, that breaches the peace and interrupts the zone of contemplation at the polling place, you bet."); ROA.652–53 (election judge's confrontation with a voter over a MAGA hat resulted in "a pretty big argument" that "went outside. The judge almost said he was going to unplug the machine and not let him vote."). At a minimum, it "absolutely" holds up the line or causes delays when an election worker confronts a voter who asserts the right to wear expressive apparel. ROA.668 (Morris); ROA.696–97 (Barker).

Procedural History. Ostrewich filed her complaint challenging the three electioneering statutes on February 28, 2019. ROA.17.[22] The State and County Defendants filed three motions to dismiss contending that the case was not justiciable and that Ostrewich failed to state a claim. The district court denied these motions. ROA.421–26. After

[22] Plaintiff Anthony Ortiz voluntarily dismissed his claims on July 10, 2020, and the parties stipulated to dismissing the Dallas County Defendants. ROA.511–12.

extensive discovery, the parties filed cross-motions for summary judgment, which were referred to a Magistrate Judge for decision. ROA.2847. The Magistrate's Memorandum and Recommendation concluded that Sections 61.003 and 85.036 are facially unconstitutional under the First Amendment but rejected Ostrewich's facial and as-applied challenges to Section 61.010 and her request for nominal damages. ROA.2863–99. Both sides filed objections. ROA.2900–49. Two days later, the district court adopted the Magistrate's Recommendation in full. ROA.2952. Both sides filed timely appeals. ROA.3110; ROA.3118.

SUMMARY OF ARGUMENT

Ostrewich's yellow union t-shirt, obtained more than a year before the November 2018 election, made no mention of Houston's Proposition B or any other ballot measure, no mention of any of the candidates endorsed or supported by the firefighter union, and no mention of any political party present on the ballot that election cycle. Bearing only the union logo, without more, the t-shirt should have been permitted. *See MVA*, 138 S. Ct. at 1890. The Harris County Elections Division announced as much the day after Ostrewich voted. ROA.728, ROA.1954, ROA.709. Moreover, the State's own interpretation of Section 61.010,

prior to the decision below, limited its applicability to name badges and emblems worn by poll workers. The State never interpreted section 61.010 to replicate the general electioneering prohibition of sections 61.003 and 85.036 but for its application solely to candidates, political parties, and measures appearing on the present ballot. ROA.916; ROA.1471; ROA.889. The district court therefore erred in holding that Ostrewich's shirt violated Section 61.010, which provides that "a person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election," in the polling place or within the 100-foot buffer.

Beyond its application to Ostrewich's shirt, Section 61.010 suffers the same constitutional infirmities as Sections 61.003 and 85.036 because the election workers charged with enforcing the prohibitions on-site at polling places are haphazard and inconsistent in determining what comes in and what must stay out. *MVA*, 138 S. Ct. at 1888. The State relies on each election worker's individual mental index of what is on the ballot and what organizations are "related" to those ballot items, thus inviting viewpoint discrimination. *Id.* at 1889–90 (First Amendment

forbids state policy that censors apparel that promotes a group with "views about the issues confronting voters in a given election") (cleaned up). The State made a deliberate choice to grant election workers unreviewable discretion to censor a wide swath of speech, plainly beyond the legitimate sweep of the statute. As such, Section 61.010 is overbroad and facially violates the First Amendment.

Finally, regardless of whether Ostrewich was confronted and censored under Section 85.036 or Section 61.010 on October 24, 2018, that completed past constitutional injury warrants vindication in the form of nominal damages. *Uzuegbunum v. Preczewski*, 141 S. Ct. 792, 800 (2021). The district court erred in depriving her of that remedy.

STANDARD OF REVIEW

Rulings on cross-motions for summary judgment are reviewed de novo, viewing the facts in the light most favorable to the non-moving party. The Court determines whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *McCorkle v. Metropolitan Life Ins. Co.*, 757 F.3d 452, 456 (5th Cir. 2014).

ARGUMENT

I

SECTION 61.010 IS UNCONSTITUTIONAL AS APPLIED TO OSTREWICH'S UNION SHIRT

A. *Minnesota Voters Alliance* Establishes the Test for Constitutionality

Speech restrictions inside a polling place are invalid when they are unreasonable in light of the purpose served by the forum. *MVA*, 138 S. Ct. at 1886. A restriction is unreasonable if there is no "sensible basis for distinguishing" speech that is allowed and speech that is prohibited. *Id.* at 1888. Speech restrictions in the 100-foot buffer zone are invalid unless they are narrowly tailored to serve a compelling governmental interest. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (plurality opinion) (100-foot buffer zone examined under strict scrutiny); *id.* at 217 (Stevens, J., dissenting) (same). The substantive rule of law is the same for facial and as-applied challenges. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019).

Even in a nonpublic forum, the State bears the burden of proving that its speech restrictions further its asserted interests. *MVA*, 138 S. Ct. at 1888 ("*the State* must be able to articulate some sensible basis for distinguishing what may come in from what must stay out") (emphasis

added); *Center for Investigative Reporting v. Southeastern Pennsylvania Transp. Auth.*, 975 F.3d 300, 314 (3d Cir. 2020) (*CIR*) (To determine the reasonableness of a policy banning political ads on public transit, "*the government actor* bears the burden of 'tying the limitation on speech to the forum's purpose.'") (citation omitted; emphasis added); *Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.*, 942 F.3d 1215, 1245–46 (11th Cir. 2019) (*government* has burden to produce a "reasoned explanation" or "other support" for a content-based restriction in a nonpublic forum that was applied arbitrarily and haphazardly); *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cty. Sch. Dist.*, 880 F.3d 1097, 1105–06 (9th Cir. 2018) (under reasonableness review, speech-restrictive policy struck down because the *government* failed to produce any evidence that "policies were actually needed to prevent disruption"). When courts consider challenges to regulations directed at "intangible 'influence,'" states must produce "specific findings" to support their interests. *Burson*, 504 U.S. at 209 n.11, citing *Mills v. Alabama*, 384 U.S. 214 (1966).

B. Ostrewich's Speech Did Not Constitute Express Advocacy

Section 61.010, entitled "Wearing Name Tag or Badge in Polling Place," prohibits a person from "wear[ing] a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election" in a polling place or within 100 feet of "an outside door through which a voter may enter the building in which a polling place is located."

Section 61.010 violates the First Amendment as applied to Ostrewich's "own expressive activities." *Jornaleros de Las Palmos v. City of League City*, 945 F. Supp. 2d 779, 798 (S.D. Tex. 2013) (citations omitted). Supreme Court caselaw has long distinguished between electioneering laws limited to restricting express advocacy and those that prohibit a broader range of speech. In *MVA*, for instance, the Court suggested that only an electioneering law restricted to "items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating "support of or opposition to a ballot question" would be "clear enough" to guide implementation and enforcement. 138 S. Ct. at 1889.

The test for determining whether a communication is "express advocacy" is an "objective" assessment of whether the communication is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 325 (2010). In *Buckley v. Valeo*, the Supreme Court listed a few examples, such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. 647 & n.52 (1976).

Objectively, Ostrewich's generic union shirt contained no such communications. As her testimony and the undisputed record makes perfectly clear, her t-shirt says nothing about Proposition B but is instead a "Houston Fire Department T-shirt to support the fire department." ROA.1891.

The State understands this distinction. When the district court asked counsel for the Secretary of State to distinguish Ostrewich's union shirt from a shirt bearing only an NRA logo, counsel argued at the summary judgment hearing that if the shirt "just says the NRA, that's not a candidate, measure, or political party" and would be allowed in the polling place. Transcript at 49–50. However, he continued, if the NRA

created a "distinctive shirt that they specifically use in all their very public campaign events, . . . [then] it's up to the election judges' discretion and . . . enforcement authority to determine whether that constitutes electioneering or not." *Id.* Ostrewich's union t-shirt, designed and acquired more than a year before the November 2018 election, did not mention Proposition B or firefighter pay—in contrast to a later design that *did* expressly state support for Proposition B. ROA.1774. The union logo alone did not reveal the union's position on Proposition B. *See* ROA.790 (Ingram: "I don't remember if it was yes or no that the firefighters were in favor of."). The generic union logoed shirt is indistinguishable from a generic NRA logoed shirt that the Secretary of State says is permitted in a polling place.

By extending the speech restrictions of Section 61.010 beyond express advocacy, the ruling below authorizes election workers to prohibit firefighter union t-shirts in any election where they are deemed "related to" a candidate, political party, or measure affecting any local fire department. Given unions' consistent political activity, *see generally Janus v. Am. Fed. Of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018), this means that voters donning t-shirts bearing a

union logo will routinely risk unwanted confrontations with election workers. *See* ROA.1533 (citing evidence of the firefighters' union's endorsement of over three dozen state and local candidates in the November 2020 election); Timothy Wilkey, *HPFFA Endorsements* (listing current candidates endorsed by the firefighter union and urging members and their family and friends to take the list to the polls when they vote).[23] The ruling below even permits election workers to censor voters wearing plain yellow t-shirts or shirts with small logos stitched onto the pocket, so long as those shirts are associated with a politically active union. *See* ROA.2865 (photographs of differently-styled union shirts). Indeed, the State's rationale for prohibiting Ostrewich's t-shirt impermissibly requires election workers to maintain "a mental index" of which apparel is "associated" with the numerous candidates, measures, and political parties on the ballot. *MVA*, 138. S. Ct. at 1881. That rationale does not lead to "fair enforcement," *id.*, particularly where, as here, the record shows that different election workers are informed in

[23] https://www.local341.org/hpffa_endorsed_candidates (visited Feb. 3, 2022). Censorship would extend to other unions' endorsement of ballot measures and candidates. Unions engage in a wide range of political activity.

different ways.[24] All told, if the election worker who confronted Ostrewich enforced Section 61.010 (instead of Section 85.036) against her, the application of that statute violated her First Amendment rights.

C. In the Alternative, Section 61.010 Does Not Apply to Generic Voter T-shirts

At a minimum, the district court's decision to apply Section 61.010 to Ostrewich should be reversed in light of the State's longstanding position that the statute does not cover voter t-shirts. *See Doe I v. Landry*, 909 F.3d 99, 112 (5th Cir. 2018) ("When the state official charged with implementing a statute has provided an interpretation of how to enforce it, we will defer unless that explanation is inconsistent with the statutory language."); *In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011) (statutory

[24] The court below misconstrued evidence of the yellow t-shirts. It ignored Ostrewich's uncontroverted testimony that there were only two Proposition B supporters who campaigned outside the boundary at the polling place when she voted on October 24, 2018, ROA.1890; ROA.1884–85, and instead relied on photographs taken on other days at other polling places—after the yellow t-shirts were permitted in the polling place. ROA.2867 (photograph taken on Election Day, Nov. 6, 2018; photograph taken on Oct. 31, 2018, at the Beall Street polling location).

interpretation may "be guided by reasoned interpretations of a statute by officials of the state executive branch").

As Elections Division attorney Christina Adkins explained,[25] Section 61.010 was not meant to duplicate the general prohibitions on electioneering contained in Sections 61.003 and 85.036, but instead "was added and subsequently amended to the code to addresses issue[s] with poll watchers using name tags as a form of electioneering." ROA.916. Adkins noted that "Poll watchers would appear in the polling place and they would wear a 'name tag' identifying themselves as a poll watcher for a specific candidate. They would often use this as a means of skirting the electioneering prohibition under 61.003 of the Texas Election Code." *Id.* Section 61.010 was amended to address this particular issue. *Id.* That "is why the language is so specific—so that poll watchers could not argue that the law did not apply to them in their role as poll watcher." *Id.* Whereas Section 61.010 was intended to govern what poll watchers can wear, "the general prohibition on Electioneering in 61.003 is more

[25] Keith Ingram framed the initial response to all inquiries to the Elections Division. ROA.1083. Regardless of the author of particular communications in the Elections Division, therefore, they are consistent with Ingram's interpretation.

general," and "applies to all individuals that are in or around the polling place." *Id.*

The Secretary of State's Handbook for Election Judges & Clerks on Election Day (revised 2020) confirms that "election judges and clerks, federal and state inspectors, peace officers, and poll watchers are the only persons allowed to wear a badge" and that "[w]earing an unauthorized name tag or badge within the polling area" violates Section 61.010(c). ROA.1471.[26]

Ingram reviewed and approved another Elections Division email that identified Sections 61.003 and 85.036 as electioneering statutes then explained that Section 61.010 "is designed in part to make sure poll watchers or other persons in the polling place do not wear badges connected with the names of the candidates they are there to observe for." ROA.889. In this context, "other persons" refers to people who remain in the polling place, not voters who are in and out in a matter of minutes. Section 61.001(a-1), enacted to consolidate permissions otherwise spread

[26] Other workers, such as peace officers and vote machine technicians, also would be expected to wear insignia or emblems reflective of their jobs and legitimate presence in the polling place. *See* Section 61.001(a-1).

across the Elections Code,[27] contains the list of "persons" permitted to be in a polling place. It includes three "persons" specifically required to wear name badges per Section 61.010(b) (election judge and clerks, state inspectors, and special peace officers) as well as other "persons" who would be expected to wear badges, insignia or emblems in the course of their duties: poll watchers; secretary of state; Elections Division staff; election officials, sheriffs and their staff; certified peace officers; county chair of a political party conducting a primary election; voting system technicians; county election officers; and any other person whose presence is authorized by the presiding judge.

Further, when members of the public cited Section 61.010 in complaints to the Elections Division about confrontations over apparel, the Elections Division's responses rested on the broader language of Section 61.003 that omitted the "on the ballot" qualifier. This shows that election officials responsible for implementing and enforcing Section 61.003 never considered that broader application to be repealed or in any way constrained by Section 61.010. As Keith Ingram explained: Sections

[27]House Research Org., *HB 1128 bill analysis* (May 4, 2021), https://www.lrl.texas.gov/scanned/hroBillAnalyses/87-0/HB1128.PDF.

"61.003 and 85.036 are the same. They're the general prohibition against electioneering, either in early voting or on election day." ROA.775. "[Section 85.036] is about early voting, and [Section 61.003] is about election day. [Section 61.010] is a more specific prohibition relating to what persons who are in the polling place can wear on a badge, and the difference is that the badge limitations are related to that particular election. So it has to be a candidate or a party or a measure that's on the ballot for that election. Those are prohibited in [Section] 61.010." ROA.775.

When the general counsel of the Harris County Democratic Party asked the Elections Division in 2018 if MAGA hats were "considered the display of an insignia or other communicative devise 'relating to a . . . political party' within the meaning and prohibition of Tex. Elec. Code Section 61.010," Ingram said no, "[a] MAGA hat is associated with a particular candidate and is electioneering under 61.003." ROA.940. He again distinguished 61.010, saying "61.003 and 85.036 deal with electioneering generally. 61.010 deals with poll workers and poll watchers and their nametags being used to electioneer." ROA.939–41. *See also* ROA.968–70 (Elections Division email explaining that 61.010

was "partly intended to prohibit workers and watchers from using name badges in such a manner as to circumvent the general rule against electioneering (e.g., 'Watcher for JOE CANDIDATE')"); ROA.973 (Because 61.010 "is naturally of great interest to watchers, it is emphasized in our poll watcher's guide."); ROA.1805 (Ingram would advise an election judge that a voter's employment badge does not fall within the statutory prohibition).

The State's treatment of Section 61.010 is consistent with ordinary rules of statutory construction. Courts must "presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011); *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998) (legislative intent cannot be determined from isolated provisions). Badges, insignia, emblems, and similar communicative devices (name tags or patches)[28] generally refer to accessories either temporarily or permanently attached to apparel to convey information about the wearer's identity or official

[28] *University of Texas at Arlington v. Williams*, 459 S.W.3d 48, 53–54 (Tex. 2015) ("[A] general or broad provision included within a more specific list should be read in context and limited to matters similar in type to those specifically enumerated.").

position, such as name, title, and employer. *See, e.g.*, *Mouille v. City of Live Oak, Tex.*, 977 F.2d 924, 925 (5th Cir. 1992) (police uniform contains "a salient badge, silver name tag, and police department emblems"). Ostrewich's union shirt did not reveal any aspect of her identity or position. She wore her shirt as generalized support for her husband, the Houston Fire Department, and the firefighters' union. *See* ROA.590–91; ROA.1814 (Mark Ostrewich acquired the shirt for his wife at the union hall 12–18 months prior to the November 2018 election). Analogously, a t-shirt bearing a Houston Astros logo does not indicate that the wearer plays or works for the Astros. It doesn't mean the wearer attends ballgames or has an opinion about the designated hitter. It is just a generalized show of support for the team.

Moreover, courts must interpret statutes to avoid surplusage, *In re VC PalmsWestheimer, LLC*, 615 S.W.3d 655, 661 n.10 (Tex. Ct. App. 2020), yet the district court's interpretation of Section 61.010's prohibitions of electioneering for candidates, political parties, and measures on the ballot would fall entirely within Section 61.003, which prohibits electioneering for candidates, political parties, and measures on the ballot in the past, *present*, and future. ROA.2889; ROA.2898. Under

the district court's construction, Section 61.010 need not exist at all. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.").

Essentially, the district court struck down the actual electioneering statutes that apply to voter apparel (Sections 61.003 and 85.036) then slid Section 61.010 into their place, inviting the State to, for the first time, officially adopt Section 61.010 as a general electioneering statute that applies to voter apparel. The State accepted that invitation, announced that Section 61.010 generally governs voter apparel as electioneering, and instructed election officials statewide to enforce it as such. Texas Sec'y of State, Election Advisory No. 2021-13 (Oct. 18, 2021). The district court's recasting of Section 61.010 as a general electioneering statute governing voter apparel contradicts the State's pre-decision interpretation of Section 61.010,[29] the State's representation of the statute in the trial court, and the overall structure of the Texas Election

[29] *See* ROA.772 (Ingram: MAGA hats prohibited in 2018 only under 61.003); ROA.314–15 (Harris County notes "specific reference to 'electioneering' in sections 61.003 and 85.036 juxtaposed with the omission of 'electioneering' from section 61.010").

Code. *See, e.g.*, ROA.1727 (Defendants' brief contending that "[Section] 61.010, which is tailored specifically to name tags or badges[,] has nothing to do with Plaintiff"); ROA.2064 (Defendants' brief reiterating that there is "no evidence that [Section] 61.010 has any application to [Ostrewich's] t-shirt, which is not 'a badge, insignia, emblem, or other similar communicative device.'").

In all, there is no evidence that the 1987 legislation adding Section 61.010 to the Elections Code intended to repeal the broader scope of 61.003 (which lacks the "on the ballot" language) by implication, *see In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013), and the record uniformly demonstrates that state and local election officials never interpreted Section 61.010 as a narrower duplicate of the general electioneering bans in Sections 61.003 and 85.036. *See* ROA.1679 (advising election judges that voters' face masks may run afoul of Sections 61.003 and 85.036 and omitting any mention of 61.010). The district court erred in employing section 61.010 as a substitute general electioneering statute and by holding that it applied to Ostrewich's generic union t-shirt.

II

SECTION 61.010 IS FACIALLY UNCONSTITUTIONAL

Even if the district court properly construed Section 61.010 as a general prohibition on electioneering rather than a name-badge statute primarily applicable to poll workers and other persons legitimately present in the polling place, it still violates the First Amendment under *MVA*'s reasonableness standard and under the overbreadth doctrine.

A. Section 61.010 Fails *MVA*'s Reasonableness Review

Speech restrictions inside of a polling place are invalid when they are unreasonable in light of the purpose served by the forum. *MVA*, 138 S. Ct. at 1886. Minnesota's law prohibiting voters from wearing a "political badge, political button, or other political insignia" into the interior of the polling place failed reasonableness review because it did not provide election judges with "objective, workable" standards for determining "what may come in [and] what must stay out" of the polling place. *Id.* at 1891. The unmoored use of the word "political," combined with Minnesota's "haphazard" interpretation in official guidance, invited erratic enforcement by election workers. *Id.* at 1888. Moreover, the statute's "fair enforcement requires an election judge to maintain a mental index of platforms and positions of every candidate on the ballot,"

id. at 1889, rendering it per se unreasonable. Given the threat that voters may witness "unfair and inconsistent enforcement," Minnesota's interest in maintaining a polling place free of distraction and disruption was "undermined by the very measure intended to further it." *Id*. at 1891. In short, a restriction is unreasonable if it is not "capable of reasoned application" such that there is no "sensible basis for distinguishing" speech that is allowed and speech that is prohibited. *Id*. at 1888, 1892.

1. *MVA*'s reference to Section 61.010 cannot save it

The State will likely point to *MVA*'s description of Section 61.010 as "more lucid" than the Minnesota law struck down in that case. 138 S. Ct. at 1891. But this reference appears to be a citation error reflecting the Supreme Court mistaken assumption that Section 61.010 was Texas's general electioneering statute, rather than Sections 61.003 and 85.036, which explicitly govern electioneering yet are never cited. Moreover, the Court's description of Section 61.010 is dicta because the Court expressly refused to "pass on the constitutionality of laws not before [it]." 138 S. Ct. at 1891. The full record developed in this case with regard to the challenged electioneering statutes controls over *MVA*'s dicta. *See Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207,

217 (2012) (ambiguous comment made without analysis in dicta is not controlling authority); *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) (dicta unnecessary to decision is not controlling in subsequent case where matter is placed directly in issue).

2. The evidence resulting in the declaration that Sections 61.003 and 85.036 are unconstitutional applies with equal force to Section 61.010

a. Section 61.010 is inconsistently enforced

Election judges and clerks, including greeters, exercise effectively unbridled and unreviewable discretion regarding the enforcement of the electioneering statutes. *See* ROA.720; ROA.993; *supra* at 18–19. Three experienced election judges, including two who staffed the polling place where Ostrewich voted, offered their assessments of what apparel was banned by the statutes and what was allowed. These experienced election workers were inconsistent amongst themselves, inconsistent with then-Administrator of Elections for Harris County Sonya Aston, and inconsistent with Secretary of State Elections Division Chief Keith Ingram. This Court should rely on their assessments just as *MVA* relied on troubling implications revealed by hypothetical applications of the law to determine that it was facially invalid. 138 S. Ct. at 1890 ("Would a

'Support Our Troops' shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a '#MeToo' shirt, referencing the movement to increase awareness of sexual harassment and assault?"); *see also Knowles v. City of Waco, Tex.*, 462 F.3d 430, 434–35 (5th Cir. 2006) (considering government's implementation of the statute in interpreting it).

Other Circuits consider evidence of on-site enforcement, including hypotheticals, to support their holdings. For example, following *MVA*, the Third Circuit invalidated a restriction on bus advertisements that "contain political messages" by considering responses to hypotheticals that highlighted "the extent to which the [restriction was] susceptible to erratic application." *CIR*, 975 F.3d at 316. The D.C. Circuit similarly relied on the government's counsel's difficulties distinguishing between stamp designs that were "politically oriented" and stamp designs that were not, in holding that the U.S. Postal Service's prohibition on customized "politically oriented" stamp designs was facially unconstitutional under the First Amendment. *Zukerman v. U.S. Postal Service*, 961 F.3d 431, 450 (D.C. Cir. 2020). The court relied on responses to hypothetical applications because, "if a regulation on speech does not

provide government decision-makers with objective, workable standards, the risk of unfair or inconsistent enforcement, and even abuse is self-evident." *Id*. (citing *MVA*, 138 S. Ct. at 1891) (cleaned up). Although statutes might survive "one or two" inconsistencies, the vast scope of disagreement among those tasked with enforcing them shows "the extent to which the [restriction is] susceptible to erratic application." *CIR*, 975 F.3d at 316–17; *see* ROA.679 (Morris: "You're going to get a different answer from different judges.").[30] The government offered no competent evidence to rebut Ostrewich's evidence of arbitrary application and erratic enforcement.

As reflected in their testimony, the on-site enforcers relied on their personal mental indices to track which organizations are "related to" candidates, political parties, and measures on the ballot. ROA.770; ROA.781–85; ROA.879. The enforcers themselves acknowledge that their mental indices contain significant gaps. ROA.680 (Morris); ROA.631 (Gray). Most election workers are retired civic-minded laypeople.

[30] Judge Oldham mentioned Harris County's inconsistent enforcement of electioneering statutes in *Hotze v. Hudspeth*, 16 F.4th 1121, 1129 (5th Cir. 2021) (Oldham, J., dissenting), where the county admitted that it did not enforce Section 61.003 against "electioneering bumper stickers on vehicles in its drive-through voting stations."

ROA.1587 (Aston: "average age of election judges probably around 72"); ROA.656 (Morris: as an election judge seeking to hire election clerks, she would phone "housewives" or retired people); ROA.1608 (Barker has been an election judge since his retirement). Ballots often are long and complicated. In addition to elections to fill federal and state offices, Texas ballots include elections for counties, municipalities, water districts, school districts, hospital districts, library districts, and emergency service districts. ROA.959–60. A single Dallas County election in May 2019 had elections for 20 municipalities, 12 school districts, and a community college district. ROA.963. Because county officials may assign experienced election workers to different parts of the city than where they reside, depending on where the need is greatest, election workers assigned beyond their neighborhood have no inherently superior knowledge of logos or other apparel designs related to local measures. *See* ROA.660. Under *MVA*, the State's reliance on individual knowledge is per se unreasonable. 138 S. Ct. at 1889 ("A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable.").

The court below improperly disregarded Ostrewich's evidence of inconsistent and haphazard front-line enforcement, stating that it showed only that "individual judges either do not understand the statute or that they have been improperly trained in its application." ROA.2892. The government provided no evidence that the deposed election officials (or any others) do not understand the statute, and the court below did not cite to any such evidence. Election workers *are* improperly trained as to the electioneering statutes, and this is by design. ROA.1692–93 (Secretary of State Elections Division Legal Director circulated advice to entire department that "in terms of training, I would let the election judges know that this is their responsibility . . . If a voter disagrees . . . it would ultimately be up to the courts to decide what is and what is not electioneering."). Despite the constant stream of questions from both election workers and members of the public as to how the electioneering statutes apply to voter apparel, both the Secretary of State's and Harris County's training deliberately is devoid of specific guidance to election workers. ROA.734–64. The Elections Division routinely refuses to provide guidance to election judges or to voters as to how the electioneering statutes apply to specific apparel, leaving it to the

discretion of local on-site enforcers even when the apparel refers to national issues. *See, e.g.*, ROA.895–96 (although Ingram believes that Harris County election judge was too stringent in banning a shirt featuring the names of Justices O'Connor, Ginsburg, Kagan, and Sotomayor, it was the judge's call to make); ROA.923–31 (election judge has discretion to decide whether a posted Black Lives Matter sign is electioneering); ROA.933–34 (election judges have discretion to tell a voter to cover up "Vote the Bible," "vote atheist," or "vote to save Big Bird" shirts); ROA.936–37 (election judge has discretion to forbid election workers from wearing "patriotic" red, white, and blue apparel); *see also* ROA.944–45 (election judges have discretion to decide if voters may wear firefighter uniforms or shirts with Houston Fire Fighters insignia). When local election officials pose "yes or no" questions, the Elections Division responds that it "is not [an] answer [the office] can give or one that should be provided to election judges." ROA.1692–93.

The constitutionality of Section 61.010 cannot turn on the depth of election worker training if it is inherently subject to haphazard enforcement. Given the limited time for training and the greater importance of other issues, election workers always will be minimally

trained. *See* ROA.657 (Morris described the difficulty of recruiting election workers and considered the three-hours of training the maximum because "nobody wants to sit through four hours of training."); ROA.661 (training focuses on the "most important" topics, such as voter ID requirements and issues with databases and equipment, rather than "what kind of T-shirts people wear"); ROA.744 (Harris County training slideshow devotes a single slide to electioneering, says nothing about apparel, and contains only one specific instruction: "Talking politics, even during a Primary, is electioneering."). The training advises on-site election officials to use their judgment; that is, their mental indices, formed by media consumption and personal interest in following politics. ROA.656–660 (Morris: because election judges are "not given that much training," they are forced to use "their own [ ] judgment" to decide which voters to confront).

Because the State made a "'deliberate or 'conscious' choice" to leave it to local election workers and the courts to determine what apparel violates the electioneering statutes, the failure to train demonstrates unconstitutionality, not justifiable censorship. *See Connick v. Thompson*, 563 U.S. 51, 61–62 (2011) (a city on notice of omissions in training

program that yet retains the program, or a pattern of constitutional violations, may show deliberate indifference and a policy of inaction that itself violates the Constitution); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). The lack of training cannot excuse the election workers' unconstitutional infringement on voters' First Amendment rights.

b. Public pressure leads to inconsistent enforcement

The court below characterizes public pressure to alter election officials' enforcement of the electioneering statutes as beneficial "checks and balances." ROA.2891 ("Where Ostrewich sees evidence of haphazard enforcement, I see evidence that the discretion of election judges is constantly monitored and reined in by a system of checks and balances."). The district court viewed the public pressure in this case as working constructively to expand voters' speech rights. But public pressure could just as easily be brought to bear on election officials to censor speech. *See Lind v. Grimmer*, 30 F.3d 1115, 1120 (9th Cir. 1994) (the possibility of public pressure influencing government decisions "rarely justif[ies] abridgment of First Amendment rights") (citations omitted); *cf. Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 890–91, 903 (1st Cir. 1988) ("acquiescence to third party pressure is not a defense" to a state

law civil rights claim of censorship). First Amendment rights do not waver based on the sufferance of the public. *See Cox v. Louisiana*, 379 U.S. 536, 551 (1965) ("[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise."); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135–36 (1992) ("Speech cannot be . . . punished or banned . . . simply because it might offend a hostile mob.").

The evidence of election workers' haphazard interpretation is not "checks and balances"—it's just confusion reflective of an army of election workers making individual, largely unreviewable decisions. ROA.1577 (the state has more than 9,000 precincts, each of which has one or more polling locations staffed by multiple election workers). Unsurprisingly, the State's response to public pressure is inconsistent. While election officials acceded to public pressure in this case, many members of the public also complained about censorship of MAGA hats when Donald Trump was not on the ballot in 2018, but election officials, including Keith Ingram, held firm that the electioneering statutes ban MAGA apparel whenever it is worn. ROA.940; ROA.772, 774–75; ROA.1930 (voter not allowed to vote and threatened with arrest if he did not cover his MAGA hat in 2018 election); ROA.1948 (Secretary of State circulated

news report of police called and voter detained for two hours because of MAGA hat in 2018). The haphazard enforcement inevitably results in viewpoint discrimination, which is unconstitutional in any forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).[31]

3. Uncontroverted evidence undercuts the State's asserted interests

In *MVA*, the Supreme Court held that states may enact carefully delineated statutes to prevent campaigning apparel within a polling place to further the State's interest to "ensure that partisan discord does not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most." 138 S. Ct. at 1888. But—and this is a critical qualification—"*if voters experience or witness episodes of unfair or inconsistent enforcement of the ban*, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it." *Id.* at 1891 (emphasis added). A district court discussed this important qualification in *Marshall v. Amuso*, No. 21-4336, __ F. Supp.

[31] Ostrewich perceived that she was targeted because Houston's mayor opposed Proposition B. ROA.604.

3d __, 2021 WL 5359020 (E.D. Penn. Nov. 17, 2021), where a parent silenced by a school board at a public meeting sued to vindicate his First Amendment rights. The district court applied the *MVA* test to a school district's policy prohibiting public comments that are "irrelevant," "abusive," "offensive," "intolerant," or "inappropriate." *Id.* at *6. The district developed no guidelines to implement this policy, allowing "little more than the presiding officer's own views to shape 'what counts.'" *Id.* at *7. The school district justified its policy by claiming that allowing such speech "would undoubtedly lead to violence." *Id*. at *10. The court rejected this justification because (1) the district provided no evidence supporting its claim, and (2) the only evidence of "heated" discourse occurred when school board representatives yelled at speakers or applied the policy to silence speakers. *Id.* As such, the court considered that enjoining the policy would "actually decrease the risk of violence at the meetings by preventing these verbal altercations over the disputed invocations of the Policy." *Id.* The court therefore granted a preliminary injunction to prevent enforcement of the speech restrictions, holding that the plaintiff speaker's facial and as-applied challenges were likely to succeed on the merits. *Id.* at *10–*12.

a. The only disruption at the polls is created by enforcement of the statutes

Election officials' on-site enforcement of the electioneering statutes creates precisely those distractions and disruptions that undermine the State's interests. *See* ROA.782; ROA.653; ROA.668; ROA.696. The record shows that the *only* apparel-based disruptions are caused by election officials confronting voters. *See Watters v. City of Philadelphia*, 55 F.3d 886, 897 (3d Cir. 1995) ("Disruption caused by actions independent of the speech at issue cannot be equated with disruption caused by the speech itself."). There is *no* evidence that voter apparel has ever resulted in disruption *between voters* at a polling place. In 17 years, election judge Kathryn Gray has never witnessed voters arguing over a voter's apparel, much less seen a fight break out. ROA.1593. In five years, election judge Terry Barker similarly has never even heard of confrontations or arguments between voters over voter apparel. ROA.1608–09. Election judge Ruthie Morris, a seven-year veteran, ROA.651, testified that while election workers' enforcement of the statutes can lead to election workers engaging in heated confrontations with voters, ROA.1599–1602, she has never seen voters fight amongst themselves because of apparel. ROA.1604.

The government presented *no evidence* of any disruption caused by even one voter based on another's voter's apparel and thus cannot meet its burden to show the restrictions are reasonable. As the Third Circuit held in *Northeastern Pa. Freethought Society v. County of Lackawanna Transit Sys.*, 938 F.3d 424, 439, 442 (3d Cir. 2019), the government bears the burden to show that banning religious speech from its nonpublic forum was reasonable and cannot meet that burden where it "failed to cite a single debate [among passengers] caused by an ad on one of its buses." The State here also presented no evidence that the union shirts generated any friction in polling places during the nine days after Sonya Aston instructed Harris County election officials to allow voters to wear them, even though photographs taken later in the early voting period and on Election Day show greater numbers of Proposition B campaigners beyond the 100-foot boundaries.[32]

[32] Other states recognize that passively wearing apparel presents no threat to polling places. *See Picray v. Secretary of State*, 140 Or. App. 592, 600 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997) (striking down political-apparel ban because the passive display of political apparel in a polling place constitutes "the silent expression of political opinion" and does not coerce or constitute "undue" influence); *cf. Tyler v. Coeur D'Alene School Dist. #271*, No. 2:21-cv-00104-DCN, 2021 WL 4896543, *12 (D. Idaho Oct. 20, 2021) (electioneering prohibition "does not appear to prevent passive conduct, like displaying a yard sign, but is instead aimed at preventing affirmative actions by individuals who have the potential to intimidate voters, to disrupt the integrity of the voting process, and to infringe upon voters' rights to cast their ballots free from interference."); Idaho Atty. Gen. Op. (Oct. 27,

b. The State's enforcement of the statutes deprives some Texans of their right to vote

The court also ignored evidence that, despite official state policy,[33] some Texas voters are deprived of their fundamental right to vote by election officials solely because of their apparel. *See supra* at 21–22 (detailing evidence, including testimony from election judges Gray and Barker, that enforcement of the statute can deprive voters of the ability to vote).[34]

The State trains elections judges to call the police on voters who resist an order to remove or cover apparel. ROA.1915 (training election workers to "contact law enforcement for potential breach of peace" if someone refuses to comply with electioneering laws). Indeed, the record

---

2020) ("If a voter appears at the poll wearing a shirt or button with election related slogans, graphics, or the like and simply goes about their business to vote without interfering with anyone else, making a statement, or any other active conduct related to their message, this office recommends that they be allowed to vote without any discussion of the issue.").

[33] Ingram testified, "if [voters] refuse to comply[,] they are supposed to be moved to the front of the line, voted, and get out of the polling place." ROA.778. This policy is found nowhere in the electioneering statutes and undercuts the State's interest. *See MVA*, Trans. of Oral Arg. at 59–60 (Feb. 28, 2018) (Chief Justice Roberts: governmental interests "might not be terribly strong if someone's about to break the law and you say, okay, go ahead . . . ."), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1435_2co3.pdf.

[34] As noted *supra* at 21, there is no tracking or reporting structure to generate a full count of how many voters are deprived of their right to vote simply because an election worker deemed a shirt or hat to be electioneering. *See* ROA.697; ROA.715.

contains evidence that election judges use this authority and beckon law enforcement to assist with voters who balk at removing or covering their apparel. ROA.1877 (Morris: "Occasionally we get people who don't understand that we're given authority and we are judges. We can call the cops on them and have them removed."); ROA.1925 (Secretary of State circulated newspaper article noting that sheriff's deputies can be called on voters who wear "clothing with political ties"); ROA.1929–30 (voter complaint in 2018 that an election judge threatened to prevent him from voting and to call the police to have the voter arrested if he did not cover "Trump" on his hat). *See also* ROA.1846–47 (detailing viral news coverage of a Texas voter arrested and jailed for failure to remove a "Basket of Deplorables" t-shirt in a polling place).

This record fully supports the district court's ruling that Sections 61.003 and 85.036 unconstitutionally infringe on voters' speech rights. The record supports the same result as to Section 61.010, to the extent that statute applies to voters' apparel.

B. Section 61.010 Is Overbroad

A law is facially overbroad when "a substantial number of its applications are unconstitutional" in "relation to the statute's plainly

legitimate sweep," and the law is not readily susceptible to a limiting construction. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973). *See VoteAmerica v. Schwab*, No. 21-2253-KHV __ F. Supp. 3d __, 2021 WL 5918918, at *10 (D. Kan. Dec. 15, 2021) ("To state a plausible [First Amendment overbreadth] claim, plaintiffs need only allege a meaningful number of illegitimate applications."). "An individual whose own speech or conduct may be prohibited" may "challenge a statute on its face 'because it also threatens [the free speech rights of] others.'" *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987).

If the district court correctly interpreted Section 61.010 as a narrower subset of Section 61.003, then the only identified difference in scope between Section 61.010 and the general electioneering statutes is that Section 61.010 contains an "on the ballot" limitation and the others do not. The government's justification for prohibiting Ostrewich's union t-shirt illustrates the constitutional deficiencies of Section 61.010. According to Keith Ingram, voters could not wear union t-shirts when they cast their ballot because the shirts "had been *associated* with a particular position on a measure at all the rallies held with regard to that

measure." ROA.790 (emphasis added). But if that were the case, any number of shirts, hats, or other apparel that an election judge might "associate" with a candidate, measure, or political party would be prohibited under Section 61.010.

Kathryn Gray, the presiding election judge at the polling place where Ostrewich voted, offered a different rationale. She testified that Ostrewich's yellow union t-shirt was prohibited electioneering because the union supported a proposition on the ballot. ROA.640–41. The Supreme Court squarely rejected these rationales in *MVA* because "[a]ny number of associations, educational institutions, businesses, and religious organizations could have an opinion on an 'issue[] confronting voters in a given election.'" 138 S. Ct. at 1890.

The district court's reasoning permits election workers to ban firefighter uniforms, any shirt with firefighter or union insignia, and, in fact, *any* t-shirt that any election worker deems "related to" any candidate, measure, or political party appearing on the ballot. *See MVA*, 138 S. Ct. at 1890 (questioning whether scout uniforms would be banned given that the presidential candidates issued statements concerning a policy of the Boy Scouts of America); *cf. Chalifoux v. New Caney Indep.*

Sch. Dist., 976 F. Supp. 659, 668–69 (S.D. Tex. 1997) (to avoid vagueness, a school policy prohibiting "gang-related" apparel must provide a definite list of prohibited items and update the list as needed and avoid giving enforcement officers unbridled discretion to decide what is "gang-related").

Section 61.010's prohibition of t-shirts featuring the logo of specific organizations sweeps in far too much protected speech because the statute depends on whether the organizations' positions are known to election judges, clerks, and greeters. ROA.1581 (Ingram: "A slogan has to be well enough known that the election judge recognizes it as a slogan."). Voters wearing apparel touting well-publicized organizations will be censored, while voters wearing apparel of lesser-known organizations walk into the polling place without incident. A ban "limited to apparel promoting groups with 'well-known' political positions," *exacerbates* the potential for erratic application. *MVA*, 138 S. Ct. at 1890. So too does Texas's practice of banning apparel that some election workers believe to be "associated with a particular position." ROA.790. In both cases, "enforcement may turn in significant part on the background knowledge and media consumption of the particular election judge applying" the

law. *MVA*, 138 S. Ct. at 1890.[35] The government must provide some "sensible basis for distinguishing" between permitted and prohibited speech, such that election judges do not try to engage in the impossible task of keeping a "mental index" of candidates, issues, and all groups that support or oppose them. *MVA*, 138 S. Ct. at 1888–89. Section 61.010's "related to" language, as interpreted by the State to permit censorship of any organization that any election worker believes (correctly or incorrectly)[36] to support or oppose a candidate or ballot measure, cannot provide adequate protection of First Amendment rights.

The record confirms that enforcement of electioneering statutes broadly prohibiting voter apparel impermissibly "turn[s] in significant part on the background knowledge and media consumption of the particular election judge applying it." *MVA*, 138 S. Ct. at 1890.[37] The

---

[35] The record shows that on-site enforcers' knowledge of organizations themselves and their positions is sketchy at best. ROA.626–27 (Gray unfamiliar with Texas Organizing Project, Workers Defense in Action PAC, and Communication Workers of America PAC); ROA.636 (Gray unfamiliar with "Me too" and the Gadsden flag); ROA.666 (Morris: "Save the Whales" could be prohibited if it "refer[s] to organizations that are pushing a certain agenda.").

[36] Texas shows little concern for election worker misconceptions. For example, Ingram testified that election judges have the discretion to ban apparel featuring the logo of the Tea Party as a "political party" just because it contains the word "Party," even though it is not an actual political party and even though he personally would permit the apparel. ROA.1582–83.

[37] The electioneering statutes' speech restrictions extend to 100 feet outside of any

State has never proffered a limiting construction of Section 61.010, asserting instead that "[a] limiting construction is not needed." ROA.345–46. *See also* ROA.951 (a limiting construction would be inconsistent with the legislative purpose to "create a politics-free zone" around the polling place). The State's position is that the language of the statute itself is sufficiently precise for reasonable people to understand. *See* ROA.1409; ROA.1429. The State thus permits censorship of *any* type of apparel which *any* election worker deems "related to" a candidate, measure, or political party on the ballot. In the absence of a limiting construction, the statute sweeps in far too much protected expression, and is facially overbroad. Whereas the possibility of inconsistent enforcement doomed the laws in *MVA*, *CIR*, and *Zukerman*, discussed *supra* at 44–45, the uncontroverted record of inconsistent enforcement dooms the electioneering prohibition here.

---

doors of the building in which a polling place is located. Tex. Elec. Code § 61.003. Speech restrictions within this 100-foot buffer zone are subject to strict scrutiny. *Burson*, 504 U.S. at 196 (plurality opinion); *id.* at 217 (Stevens, J., dissenting) (same). Because the electioneering statutes fail reasonableness review, they necessarily fail under strict scrutiny as well.

III

OSTREWICH IS ENTITLED TO NOMINAL DAMAGES

The district court erred in holding that Ostrewich's claim for nominal damages was "impermissible" as to the State Defendants and "fails as a matter of law" as to the County Defendants. ROA.2887; ROA.2896. A civil rights plaintiff may request a dollar in nominal damages that can be paid by *any* party. *Familias Unidas v. Briscoe*, 619 F.2d 391, 405 (5th Cir. 1980) (where Section 1983 plaintiff sought nominal damages against a state and a school district in action to invalidate an unconstitutional state statute, the school district is solely accountable to pay the award). In its ruling denying the motions to dismiss, the court below held that Ostrewich could recover nominal damages from county officials who are named defendants, eliminating any sovereign immunity issue with state officials. ROA.426 (citing *N. Ins. Co. of New York v. Chatham Cty., Ga.*, 547 U.S. 189, 193 (2006)).

As to the County Defendants, the court below improperly held that Ostrewich does not have a proper claim of nominal damages because her shirt was properly banned under Section 61.010. ROA.2896. When the government violates a plaintiff's constitutional rights, courts may award

nominal damages without proof of any additional injury. *Uzuegbunum*, 141 S. Ct. at 800 (nominal damages are awarded by default after proof of legal injury, that is, violation of a right); *Roberts v. Carroll*, No. 4:18-cv-04-SKL, 2021 WL 5139505, at *3 (E.D. Tenn. Nov. 3, 2021) (applying *Uzuegbunum* and holding that plaintiff is entitled to nominal damages if he prevails on one of two interrelated claims); *Jennings v. City of Univ. City, Mo.*, No. 4:20-CV-00584 JAR, 2022 WL 157495, at *5–*6 (E.D. Mo. Jan. 18, 2022) (plaintiff entitled to nominal damages for two instances of censorship under city's former speech-restricting ordinance); *see also Carey v. Piphus*, 435 U.S. 247, 266 (1978) (nominal damages awarded for violation of procedural rights); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (same for violation of substantive rights). Ostrewich remains entitled to nominal damages because at least one of the unconstitutional statutes, Section 85.036, applied to her and all three statutes create a subsequent chilling effect.

CONCLUSION

To the extent the decision below upheld Tex. Elec. Code § 61.010 against Ostrewich's facial and as-applied constitutional claims, the

decision should be reversed and Ostrewich should be awarded nominal damages.

Dated: February 8, 2022.

Respectfully submitted,

WENCONG FA
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation

By /s/ Wencong Fa
WENCONG FA

Counsel for Plaintiff-Appellant-Cross Appellee Jillian Ostrewich

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2022, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Wencong Fa
WENCONG FA

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) because it contains 12,941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. Rule 32.1.

2. This brief complies with typeface and type style requirements of Fed. R. App. P. 32(a)(5), and 5th Cir. Rule 32.1, and the type style requirements under Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word for Office 365, in 14-point Century Schoolbook font.

/s/ Wencong Fa
WENCONG FA